Supreme Ct.
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No. 01-69

IN THE

Supreme Court of the United States

GEORGE L. GAUNT and
THE CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Petitioners,

v.

DONALD E. PITTAWAY, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR and THE NALLE CLINIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The Nalle Clinic is a North Carolina corporation without a parent company and in which no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The Petitioners' brief is a re-statement of the arguments that have been rejected by the Superior Court for Mecklenburg County North Carolina, the Court of Appeals of North Carolina twice and by the North Carolina Supreme Court on two separate occasions. As every opinion has been unanimous, petitioners' arguments, once applied to the appellate record, have failed to convince even one of the many judges who have decided the case.

No new legal issue is raised in the petition, no split in the circuit courts needs to be rectified. The undisputed facts that were presented during the pendency of this matter have been decided, unanimously, based on the application of well-settled case law.

Under Rule 14 of the Rules of the Supreme Court of the United States, it is required that a petitioner seeking review of a state-court judgment include a concise statement, including specific reference to:

> [T]he stage of the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts. . . .

(Rule 14)

No effort was made by the Petitioners to comply with Rule 14. The petition is silent when it comes to citations, specific or otherwise, of when any federal questions first

arose in this litigation which was decided under the defamation law of the State of North Carolina.

No Federal issue was raised in the Complaint or other pleadings filed with the court of first instance, nor was one raised in the Assignments of Error, which, under North Carolina Law, determine the scope of the issues on appeal.

Importantly, the courts in North Carolina resolved this matter on independent state grounds, leaving no substantive matters to be resolved under federal law and precluding review by this court under *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Under North Carolina law " an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.' " *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435-36, 291 S.E.2d 852, 857 (1982), *appeal dismissed*, 307 N.C. 459, 298 S.E.2d 385 (1983).

While the court in Gaunt II[1] referred to federal cases in its analysis, it reaffirmed the North Carolina standard for a limited purpose public figure and held that "[w]e believe plaintiffs satisfied both the federal *and state* definitions of limited purpose public figures." 139 N.C. App. 778, 534 S.E.2d 660 (2000) (emphasis added) As the appellate courts of North Carolina have determined that the Petitioners are limited purpose public figures under state law, there is no legitimate interest in federal review.

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1. 139 N.C. App. 778, 534 S.E.2d 660 (2000) This was the second opinion issued by the North Carolina Court of Appeals.

STATEMENT OF THE CASE

This case arose out of an article entitled, " 'Miracle Baby' Attempts Raise Questions" (the "article") that was published in the Charlotte Observer newspaper on September 15, 1991. During the course of her research and investigation, the article's author, Karen Garloch, interviewed, among others, Defendant Donald E. Pittaway, MD., the head of the Reproductive Endocrinology section of the Bowman Gray Medical School. (Pittaway Aff. Para 4; T p. 011870) (Garloch Aff. Para. 31, 36-37, 57; T pp. 011227, 011231-011236, 011260.) In the article, Dr. Pittaway made several statements regarding his opinion of Dr. George L. Gaunt's training and experience in the field of *in vitro* fertilization. Pittaway also made statements to the effect that, in his opinion, Gaunt frequently ordered tests that were unnecessary and expensive. The Nalle Clinic defendants made similar statements.

Following the publication of the article on September 15, 1991, a complaint was filed in the Superior Court for Mecklenburg County. The complaint only identified statements that were set forth in the article. At the appellate stage, for the first time, and repeatedly in their Petition to this Court, the Petitioners refer to statements allegedly made by the respondents in their meetings with Garloch. Under settled North Carolina law, these statements, which were not set forth in the Complaint, should not be considered on appeal. *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 266 S.E.2d 861 (1980) Further, the statute of limitations on any alleged claims related to these "source statements" ran years ago. *Gibson v. Mutual Life Ins. Co.*, 121 N.C. App. 284, 465 S.E.2d 56 (1996).

With regard to the statements that were allegedly made, but not referenced in the Complaint, it should be noted that under North Carolina Rule of Civil Procedure 15, the petitioners had ample opportunity to move the court for leave to amend their complaint. Petitioners never sought to exercise this option and lost the opportunity to do so once the matter was resolved by the Trial Court at summary judgment. *Gladstein v. South Square Associates*, 39 N.C. App. 171, 177, 249 S.E.2d 827, 830 (1978). As any issues related to the statements not included in the article have been waived, they are not available for review under federal law.

Despite arguments to the contrary, no statements contained in the article refer to the plaintiffs as "criminals" and the only reference to "criminally predatory charlatans" is in the plaintiffs' petition to this Court.

The two main areas of opinions expressed in the article, the level of training and experience in the field of *in vitro* fertilization and the necessity of the testing at CRM, were explored during discovery. The Petitioners' own medical expert, Dr. Howard Jones, testified that CRM was the *only* IVF program in the country that had a medical director with no residency training. (Jones Dep. p. 309; T p. 010341; App. 1) He further admitted that in 1991, CRM did *not* meet the *minimum* standards for an IVF clinic as published by the American Fertility Society[2]. (Jones Dep. p. 365; T p. 01035; App. 2) Further, Gaunt's expert acknowledged that reasonable specialists could disagree with the appropriateness of Gaunt's testing practices. (Jones Dep. p. 561; T p. 01426; App. 3)

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2. Jones clarified "minimal standards" to mean "the very least someone should have in order to provide a program in *in vitro* fertilization." (Jones Dep. p. 288; T p. 010335, App. 4)

While the Petitioners, in their various appellate filings, have questioned the existence of a public debate, their own Public Relations agent, Bill Ballenger did not. He testified as follows:

> Q: One of the controversial issues that was very much in the public debate and with Congress and the North Carolina Legislature was whether clinics that did in vitro fertilization should have a reproductive endocrinologist of staff, is that correct?
>
> A: That's correct.
>
> Q: That's what you understood the controversy to be?
>
> A: That's the major controversy, yes.

(Ballenger Dep. p. 114; T p. 008320, App. 5)

Ballenger further acknowledged that the controversy "certainly was hot public debate, no doubt." (Ballenger Dep. p. 581, App. 6).

The record produced during discovery also established that Gaunt took the highly unusual step of hiring his own personal lobbyist, Stephen L. Meehan, to "assist them in having a portion of . . . legislation requiring clinics doing IVF treatment to have a reproductive endocrinologist on staff removed from the legislation. . . ." (Meehan Aff.; T p. 009523-24) There was no dispute that "Gaunt and [CRM] . . . actively participated in [the]controversy in order to influence the resolution of the issue of whether

reproductive clinics should be supervised or directed by reproductive endocrinologists." (Ballenger Dep. p. 516; App. 7) In fact, Gaunt personally summarized his involvement in the controversy by stating that he had "spent every spare moment trying to stop this lunacy." (T p. 009635-36)

Following extensive discovery, the Trial Court granted the defendants' motions to Dismiss the Unfair and Deceptive claims on May 10, 1994 (R p. 139). On July 25, 1995, the Trial Court granted the Respondents' motion for partial summary judgment and concluded that the Petitioners were limited purpose public figures. (R p. 158) Respondents then moved for summary judgment on petitioners' defamation claims. The court granted these motions in orders and judgments entered on June 24, 1997. (R p. 264)

Petitioners filed a notice of appeal (R p. 279, as amended) and on November 2, 1999, the North Carolina Court of Appeals issued an opinion affirming the Trial Court. (Gaunt I) The Petitioners sought and obtained a rehearing that resulted in a second opinion from the North Carolina Court of Appeals filed August 29, 2000. (Gaunt II) In unanimous opinions in both Gaunt I and Gaunt II, the Court of Appeals affirmed the Trial Court in all respects and further found, *inter alia* that: "[w]e believe plaintiffs satisfied both the federal and state definitions of limited purpose public figures." (Gaunt II, App. 30)

In so holding the court found not only that there was a controversy, but also that "Gaunt had thrust himself into the vortex of the controversy". (Gaunt II, App. 31)

The Court of Appeals also held that, "Our review of the record in this matter reveals that the statements made by the

defendants are statements of opinion affecting matters of public concern within the context of *Milkovich*." (Gaunt I, App. 18)

Finally, the Court held that "[A]ssuming *arguendo* that the defendants' statements were not matters of opinion, plaintiffs failed to show malice on the part of the defendants." (Gaunt I, App. 18)

The Petitioners, in a document dated October 3, 2000, sought review by the North Carolina Supreme Court. As a result of the unanimous decision by the Court of Appeals, pursuant to N.C. Gen. Stat. § 7A-30, the only ground for an appeal of right to the Supreme Court would be for a matter "which directly involves a substantial question arising under the Constitution of the United States or of this State." In the alternative, pursuant to N.C. Gen. Stat. § 7A-31, the Petitioners sought discretionary review by the North Carolina Supreme Court.

The Respondents filed a motion to dismiss the appeal for lack of a substantial constitutional question and also filed an opposition to the petition for discretionary review. On December 21, 2000, the North Carolina Supreme Court, in conference, granted the motion to dismiss the appeal for lack of a substantial constitutional question and denied the petition for discretionary review. As such, the Supreme Court of North Carolina determined that no substantial constitutional question was preserved for review.

The orders of the North Carolina Supreme Court were subsequently filed with the Court of Appeals and the case, it seemed, was resolved. However, the Petitioners filed a petition seeking discretionary review by the North Carolina

Supreme Court, which was denied in conference on April 5, 2001. Thereafter, petitioners submitted their Petition for Certiorari to this Court.

REASONS FOR DENYING THE WRIT

I. THE EVIDENCE SUPPORTED THE STATE COURT FINDING THAT GAUNT WAS A LIMITED PURPOSE PUBLIC FIGURE.

A. The Standard for Determining a Limited Purpose Public Figure Has Been Judicially Determined.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the United States Supreme Court held that plaintiffs who have voluntarily injected themselves into particular public controversies are to be classified as limited purpose public figures and thereby bear the burden of proving that the alleged defamatory statements were made with actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

The inquiry for determining whether a defamation plaintiff is a limited purpose public figure is twofold: (1) was there a particular public controversy that gave rise to the alleged defamation; and (2) did the plaintiff thrust himself into the forefront of that particular public controversy in order to influence resolution of the issues so as to justify public figure status. *See Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979); *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979).

In the case of *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 201 U.S. App. D.C. 301 (1980), *cert. denied,* 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980), the United States Court of Appeals for the D.C. Circuit addressed the standard of what amounted to a public controversy:

"A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in a general way." 627 F.2d at 1297, 201 U.S. App. D.C. at 311. Additionally, "the court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment." 627 F.2d at 1297, 201 U.S. App. D.C. at 311.

Courts have often noted that one policy reason underlying the public figure standard is that public figures may have access to channels of effective communication. *Gertz*, *supra*; *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708 (4th Cir.) Cir.), *en banc*, *cert. denied*, 501 U.S. 1212, 111 S. Ct. 2814, 115 L. Ed. 2d 986 (1991).

Under North Carolina law, an individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy. *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 291 S.E.2d 852 (1982), *appeal dismissed,* 307 N.C. 459, 298 S.E.2d 385 (1983).

B. There was a Public Controversy

A public controversy regarding infertility medicine, and primarily the qualifications necessary to practice infertility medicine, existed at the time of the alleged defamatory statements. Mainstream media publications including *Glamour*

Magazine, Time Magazine, U.S. News & World Report and *Business Week* had reported on the topic. (R p. 267 *et seq.*, Nos. 9 and 13, deposition of William Ballenger and documentary exhibits)[3]. Congressional hearings and/or proposed legislation regarding the topic had occurred at both the national and state levels. (R p. 266, No. 7, Exs. 30 and 31 to the deposition of Gaunt; R p. 271, No. 56). Petitioner's own public relations agent, William Ballenger, testified that this issue was one of "hot public debate" and he had discussed the public concern over the issue of proper credentials to practice *in vitro* fertilization many times with Petitioner Gaunt (R p. 267, No. 9 pp. 581-2 to deposition of William Ballenger).

In fact, as set forth above, the Petitioners' own witness, Mr. Ballenger recognized the existence of the public debate. (Ballenger Dep. p. 114; T p. 008320, App. 18.)

> Q: One of those controversial issues that was very much in the public debate and with Congress and the North Carolina legislature was whether clinics that did *in vitro* fertilization should have a reproductive endocrinologist on staff, is that correct?
>
> A: That's correct.

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3. *Time* (T pp. 009559-60, 009578, 009584-85, 009593-009600), *Newsweek* (T pp. 009570-71, 009609-10.), *Life* (T pp. 009561-69), *Glamour* (T pp. 009573-77.), *Forbes* (T pp. 009557-58.), *People* (T pp. 009550-56), *Business Week* (T p. 009582-83), *U.S. News & World Report* (T pp. 009579-80, 009618-24), *The New York Times* (T p. 009601-08), *The Wall Street Journal* (T p. 009572), *The Los Angeles Times* (T pp. 009586-92), and *The Virginian-Pilot* and *The Ledger-Star* (T pp. 009611-17).

Q: That's what you understood the controversy to be?

A: That's the major controversy, yes.

(T p. 008320; App. 18.)

As early as 1987, the medical community itself had addressed "consumer" issues regarding the possible exploitation of infertile couples, including the problem of unnecessary testing by doctors who were either improperly trained or exploitative. (T pp. 009485-89.) The Congressional subcommittee hearings which addressed some of these issues were entitled "Consumer Protection Issues Involving *In vitro* Fertilization Clinics." (T pp. 009492-009502.)

Debate on issues involving public health and consumer issues is certainly a matter of "public concern." In *Quantum Electronics Corp. v. Consumers Union of U.S., Inc.*, the district court specifically noted that a controversy involving a "significant public health issue," was the type of public controversy for which this doctrine was designed. 881 F. Supp. 753, 765 (D.R.I. 1995).

C. Gaunt Thrust Himself into the Public Controversy in an Effort to Affect its Outcome

In order to be considered a limited purpose public figure in an ongoing public controversy, "[t]he plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1297, 201 U.S. App. D.C. at 311 (1980), *cert. denied*, 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980).

It has been made clear that "those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1298, 201 U.S. App. D.C. at 312 (1980), *cert. denied*, 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980).

The Petitioner actively and purposely injected himself into the controversy regarding appropriate standards for the practice of infertility medicine and *in vitro* fertilization with the express purpose of influencing its outcome.

Gaunt fought efforts of the American Fertility Society to establish and promote its recommended minimal standards for facilities providing IVF, apparently because CRM did *not* meet those minimal standards. Ironically, the minimal standards were drafted by the Petitioners' own expert witness, Howard Jones, who opined that CRM did not meet those standards:

> Q. [I]s it true that as of September 15, 1991, based on your knowledge, the Center for Reproductive Medicine did not meet the minimal standards as written?
>
> A. I think that's correct.

(Jones Dep. p. 365; App. 13.)

Petitioner appeared on various forms of local media[4], hired

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4. *The Charlotte Observer, the University of North Carolina at Charlotte News, North Carolina Magazine, Healthcare News, The Business Journal, Business North Carolina, Greensboro News* (Cont'd)

a public relations firm, scheduled new conferences and had media information kits provided to media outlets. (R p. 267 *et seq.*, Nos. 9 and 13, deposition of William Ballenger and documentary exhibits).

Gaunt undertook to influence the outcome of the controversy regarding the appropriate qualifications to practice infertility medicine by writing Rep. Wyden to argue his position. (T pp. 009663-009665; App. 25-27.) Gaunt also wrote to numerous other elected officials, including Congressman J. Alex McMillan (T p. 009638-41; App. 28-31), State Senator Fountain Odom (T p. 009642; App. 32-34), and State Representative Nick Jeralds, (T p. 009647; App. 35-36).

Gaunt personally contacted dozens of IVF programs and several organizations in an effort to affect the outcome of the debate[5] and drafted a form letter to various physicians in a continuing effort to affect legislation at the state and federal levels.

Additionally, he took the highly unusual step of hiring his own personal lobbyist, Stephen L. Meehan, to further his agenda. (Meehan Aff. ¶ 31; T p. 009521.) Meehan stated that he was hired to "assist them in having the portion of . . . legislation requiring clinics doing IVF treatment to have a

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& Record, Charlotte Magazine and the Charlotte area's radio and television stations. (T pp. 009333-37, 009349, 009379-81, 009396, 009397-98, 009401, 009411, 009419-21, 009422-28); (Ballenger Dep. at 40, 82; T pp. 008246, 008288; App.23-24.)

5. August 31, 1989 letter to Gary Berger, MD.

reproductive endocrinologist on staff removed from the legislation. . . ." (Meehan Aff.; T p. 009523-24.)

Gaunt not only solicited others to join in the effort,[6] he personally tried "to influence the legislation in North Carolina, . . . [and] attempt[ed] to influence it at the congressional level as well . . ." (Ballenger Dep. p. 561; App. 22) There can be no dispute that "Gaunt and [CRM] . . . actively participated in [the] controversy in order to influence the resolution of the issue of whether reproductive clinics should be supervised or directed by reproductive endocrinologists." (Ballenger Dep. p. 516; App. 21.) Perhaps Dr. Gaunt summarized it best when he wrote that he had "spent every spare moment trying to stop this lunacy." (T pp. 009635-36.)

Gaunt's activities far exceed those of other plaintiffs who have been found by the courts to be public figures. For example, the West Virginia Supreme Court held that a physician was a limited purpose public figure based on "the quantity of his letter writing to newspapers, professional journals and organizations, fellow physicians, and government officials regarding the controversy. . . ." *State ex rel. Suriano v. Gaughin*, 198 W. Va. 339, 480 S.E.2d 548, 558 (W. Va. 1996). *See Reuber, supra.*[7]

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6. *See* letters to Dr. Gary Berger, Emil Steinberger and I. Ray King, M.D. (T p. 009634, 009635-36, 009637.)

7. *See also McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 613 F. Supp. 1349 (D.D.C. 1985), *aff'd in part, rev'd in part*, 800 F.2d 1208 (D.C. Cir. 1986) (doctor's testimony at a government

(Cont'd)

Courts have often noted that one policy reason underlying the public figure standard is that public figures may have access to channels of effective communication. *Gertz*, *supra*; *Reuber*, *supra*.

There is no question that Dr. Gaunt and CRM had ready access at all times to local media. Ballenger noted that even after the article was published, he felt the petitioners could have used their media contacts to reemphasize favorable opinions and information about Dr. Gaunt and CRM. (Ballenger Dep. pp. 517-525.) A telling indication of the lack of merit in the petitioners' claims, Ballenger testified that he had found nothing inaccurate in the article and neither Dr. Gaunt nor Barbara Fields suggested to him that there was anything inaccurate in the article. (Ballenger Dep. p. 110; T p. 008316; App. 37.)

(Cont'd)
hearing on drug safety was sufficient to make him a public figure for purposes of that controversy); *Park v. Capital Cities Communications, Inc.*, 181 A.D.2d 192, 585 N.Y.S.2d 902 (N.Y.A.D.), *appeal dismissed*, 80 N.Y.2d 1022, 607 N.E.2d 815, 592 N.Y.S.2d 668 (1992), *leave to appeal dismissed in part, denied in part*, 81 N.Y.2d 879, 613 N.E.2d 961, 597 N.Y.S.2d 929 (1993) (doctor's appearance on local radio and television stations and invitations to local television stations to do broadcasts on outpatient cataract surgery performed in his office, was a limited purpose public figure); *Ferguson v. Watkins*, 448 So. 2d 271 (Miss. 1984) (emergency physicians, because they had become involved in the dispute over hospital emergency room issues, were limited purpose public figures); *Cera v. Gannett Company, Inc.*, 47 A.D.2d 797, 365 N.Y.S.2d 99 (N.Y.A.D. 1975) (plaintiff chiropractors were public figures in a debate concerning chiropractic medicine because they had presented their views on a local television broadcast).

II. THE ALLEGEDLY DEFAMATORY STATEMENTS AT ISSUE WERE OPINIONS WHICH DID NOT CONTAIN A PROVABLY FALSE FACTUAL CONNOTATION AND WERE NOT MADE WITH ACTUAL MALICE.

A. As North Carolina courts have not addressed whether statements which did not appear in the newspaper article were defamatory statements, this Court should decline jurisdiction.

As set forth above, petitioners identify a number of allegedly defamatory statements attributed to Respondents which did not appear in the article. Such statements were not alleged to be defamatory in Petitioners' complaint nor presented as defamatory statements to the trial court at the hearing on the motion for summary judgment.[8] The North Carolina Court of Appeals and North Carolina Supreme Court have not addressed whether such statements were defamatory or even whether they were properly preserved for appellate review.

Where the highest state court has failed to address a federal question, it is assumed that the omission was due to a lack of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. In such a situation, this Court has considered itself without jurisdiction to consider such an issue. *Exxon Corp. v. Eagerton*, 462 U.S 176, 181 n.3, 103 S. Ct. 2296, 2300 n.3, 76 L. Ed. 2d 497 (1983).

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8. It should be noted that Counsel for petitioners have served only as appellate counsel for petitioners. Petitioners were represented by other counsel at the trial court level.

North Carolina appellate courts follow a similar rationale and will not ordinarily pass upon a constitutional question unless it affirmatively appears that such a question was raised and passed upon in the trial court. *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141 (1971). This rule would seem particularly applicable in defamation actions, where North Carolina plaintiffs are limited to those statements alleged with sufficient particularity in their complaint to allow the trial court to determine whether such statements were defamatory. *Stutts v. Duke Power Co., supra.*

This court should decline to exercise its jurisdiction to review statements which did not appear in the newspaper article and were not considered by the North Carolina courts. The only statements at issue were those which appeared in the newspaper article.

B. The statements were opinion which did not contain a provably false factual connotation.

Since *Gertz v. Robert Welch, Inc., supra*, it has been held that the First Amendment protects opinion speech:

> Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

In *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), this Court declined to explicitly provide additional constitutional protection for

opinion speech, reasoning that constitutional protection was already amply insured for statements of opinion relating to matters of public concern which do not contain a provably false factual connotation.

In the instant case, the statements attributed to respondents in the newspaper article generally concern: (1) the Petitioners' training and credentials to practice *in vitro* fertilization; and (2) whether the Petitioners performed unnecessary testing.

With respect to Petitioners' training and credentials, it is undisputed that Petitioners' training failed to comport with the American Fertility Society's minimal standards for *in vitro* fertilization, which required an individual with the experience and training required for board certification in reproductive endocrinology or an individual with equivalent training and experience.[9] Petitioners' own expert testified that Petitioners did not meet the American Fertility Society minimal standards.

With respect to testing, even the Petitioners' own expert medical witness testified that reasonable medical experts could question the number, cost, relevance and appropriateness of some of Petitioners' testing.

In cases similar to the instant case, courts have found allegedly defamatory statements to be constitutionally protected speech. In *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515 (W.D. Ok. 1992) statements regarding the qualifications

9. Petitioner Gaunt did not have a reproductive endocrinology fellowship. He had no obstetrics/gynecology residency. Instead petitioner Gaunt had completed less than one year of a three year laboratory medicine residency.

of the plastic surgeon plaintiff and potential harm to patients were held to be opinions and not purported actual verifiable statements of fact. In *Woodward v. Weiss*, 932 F. Supp. 723 (D.S.C. 1996), allegedly libelous statements that a physician's patients had received excessive and unnecessary treatment were constitutionally protected opinions.

C. The statements were not made with actual malice.

Actual malice has been defined as publication of a statement with knowledge that it was false or with reckless disregard as to whether or not it was false. *New York Times Co. v. Sullivan, supra.* Reckless disregard for truth or falsity "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, at 1325, 20 L. Ed. 2d 262 (1968). The reckless disregard standard is a subjective one. It requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 655, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

The question whether the evidence is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton, supra.* In ruling on a motion for summary judgment, the trial court must consider the quantum and quality of proof necessary to support liability. In cases where the actual malice standard

applies, the trial court, at the summary judgment level, must determine whether a rational trier of fact could find actual malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Petitioners failed to present any evidence, yet alone clear and convincing evidence, that the statements were made with serious doubts as to the truth of the publication. In fact, as discussed earlier, respondents' statements regarding Petitioners' training and credentials were consistent with the American Fertility Society minimal standards. The reasonableness of the statements regarding testing was confirmed by the Petitioners' own expert. As such, it was properly determined that no rational trier of fact could find clear and convincing evidence of actual malice.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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